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DISCUSSION KICK-OFF

Thinking globally, acting regionally

Towards the regionalization of international criminal law

RICARDA RÖSCH — 27 May, 2016

In June 2014, the African Union (AU) General Assembly adopted the Malabo Protocol that attempts to change the AU court system as well as international criminal law (ICL) in a radical – yes, even revolutionary way. The Protocol foresees the creation of an integrated African Court of Justice and Human Rights featuring a human rights chamber, a general affairs chamber and a criminal law chamber that has jurisdiction over natural and legal persons.

So far, the proposal has sparked much criticism for its extensive immunity clauses, the potential tensions with the

International Criminal Court (ICC) and its under-funding. Serving heads of governments and states, as well as senior officials enjoy immunity from prosecution. Nevertheless, it deserves a more detailed engagement with its unique features: first of all, the establishment of a regional criminal chamber has a significant institutional impact as the African Court originates from the periphery of IO system and could help to challenge its postcolonial bias. Secondly, a normative change can be observed through the introduction of additional crimes and corporate criminal liability. The regionalization of ICL could, therefore, contribute to the postcolonial project and to the development of ICL.

Decolonizing international criminal law

The one-sided engagement with the Malabo Protocol is particularly disappointing in view of its origin. It is an attempt of African states to develop ICL. It challenges the monopoly of Western states in the sphere of international law. Even though 34 African states have ratified the Rome Statute, it has to be kept in mind that states are not equal in the ICC's architecture. According to art 16, the Security Council (SC) can defer investigations and prosecutions. Moreover, it can refer a situation to the ICC under Chapter VII UN Charter, even when the state in question is not a signatory to the Rome Statute. The permanent members then are in a privileged position, as the adoption of resolutions requires their concurring vote (art 27 (3)). Not a single African country is a permanent member of the SC, though. While the discussions surrounding the ICC's anti-African bias are highly politicised, it cannot be neglected that ICL fails to 'upset the global balance of power'.

The objection that regional ICL is just as state-centric as traditional ICL and can equally be abused by governments is justified. Without losing sight of this problem, I call for exploring under which conditions regional law could provide a 'counter-balance to the hegemonic international law' and contribute to the decolonisation of ICL.

Towards the regionalization of ICL

The regionalization of international law is not a new idea. In the context of the Cold War, European states decided to develop a regional human rights system as no international consensus could be found. Subsequently, it flourished to an extent – both in terms of content and enforceability – that would not have been possible globally. There is no reason why this should not be possible in the field of ICL. Regionalizing ICL holds advantages both compared to supra-regional international and national prosecutions.

A regional chamber is more distant from national politics. It could easier maintain its impartiality and benefit from an increased credibility for affected communities. Compared to an international tribunal, it is both physically and psychologically closer. It is easier to access in terms of time, distance and money and could and it could enter more easily into a dialogue with local communities. ICL procedures in Rwanda and Uganda, for instance, has been criticised for being one-sided, eventually doing more harm than good. The same could of course happen regionally, but at least there is a bigger chance that local communities succeed in making use of the normative or institutional framework.

A normative contribution to the development of ICL

Makau Mutua criticises ICL for neglecting the context in which atrocious human rights violations occur. It needs to take structural violence into account, which can be the source and result of direct violence. The Malabo Protocol with its 14 crimes acknowledges the entanglement of political and economic power that accounts for the marginalization of many communities. This holistic approach seeks not only to sanction direct violence, but also structural forms of violence like poverty by criminalizing, for instance, money laundering. One example that demonstrates very nicely how the Malabo Protocol seeks to put ICL in a broader context is the crime of corruption. Corruption fosters inequalities, which are a form of structural violence. The AU estimates that 25% of the GDP of African states is lost due to corruption. Internationally, there is no consensus on whether it should be an international crime.

But also the introduction of corporate criminal liability is an important step: the extractive industries, for instance, are to a large extent controlled by multinational corporations (MNCs) in Africa. Consequently, the problem of corporations being involved in human rights violations arises frequently. A 2002 UN report found that 85 corporations illegally exploit natural resources in the Democratic Republic of Congo. Even though several DRC-related cases were brought to OECD National Contact Points, the outcome was often not satisfying and national prosecutions did not take place. The adoption of the Malabo Protocol could open up new vistas and have a deterrent effect on MNCs. Consequently, the Malabo Protocol adds a non-Western perspective to ICL and sends an important message to the national legal systems, but also to the ICC.

Problems and prospects

Most critics revolve around the immunity clauses and the relationship with the ICC. In view of the failure of many Third World states to 'enfranchise the dispossessed', the immunities are particularly problematic. The Malabo Protocol has been adopted in a highly politicised climate and the fear that the new court could make African states withdraw their ratification of the Rome Stature is somewhat understandable. However, the Malabo Protocol does not release the signatories of the Rome Stature from their obligations, so prosecution of heads of state before the ICC would still be possible. The elaboration process behind closed doors and the lack of engagement with local actors is also most regrettable. Nevertheless, it has to be kept in mind that the Protocol is not even in the ratification process yet, as it has only five out of the 15 necessary signatures. Therefore, it would still be possible to confront and correct its weaknesses. Having seen all this, I would strongly call for not reducing the Malabo Protocol to its controversial features, but to rather explore its potential contribution to the development of regional and ICL and its impact on the ground.

Ricarda Rösch works as research associate in a project on transnational economic law and human rights in Erlangen. Her research focusses on human rights in sub-Saharan Africa and she is interested in postcolonial and feminist theory. She hold a LLB from Hanse Law School and a LLM from SOAS.

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SOLOMON MURRAY

27 July, 2016 at 13:49 (Edit) — Reply

Your presentation on law issues as it relates to African countries is well noted. But the problems are more than the observations of international bias and post colonial influence over former colonies.
As Africans, our leaders must muster the courage to actualize what is written on paper. Like in the words of President Obama, be true to what we say on papers. When we put up the political will then our international counterparts will only give judgement based on opinion of an outside observaver. That will in No way affect the decisions of our people.

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